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03
04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 CESAR GONZALEZ SOLIS,) CASE NO. C08-1453-MJP
07)
07 Petitioner,)
08)
08 v.)
09) REPORT AND RECOMMENDATION
09 A. NEIL CLARK, Field Office Director,)
U.S. Immigration and Customs Enforcement,)
10)
Respondent.)
11)
_____)

12 I. INTRODUCTION AND SUMMARY CONCLUSION

13 Petitioner Cesar Gonzalez Solis, proceeding pro se, has filed a Petition for Writ of Habeas
14 Corpus pursuant to 28 U.S.C. § 2241, challenging his detention by the U.S. Immigration and
15 Customs Enforcement (“ICE”). (Dkt. 9). Petitioner argues that his detention is unlawful because
16 he is unable to pay the \$30,000 bond amount imposed by the Immigration Judge, and requests that
17 this Court order the Immigration Judge to hold a hearing “wherein the government bears the
18 burden of persuasion that the Petitioner is a flight risk or a danger to society.” (Dkt. 13 at 9).
19 Respondent has moved to dismiss, arguing that petitioner has received a bond hearing, and that
20 no further custody review is necessary or warranted. (Dkt. 11).

21 Having carefully reviewed the entire record, I recommend that petitioner’s habeas petition,
22 Dkt. 9, be DENIED, and that respondent’s motion to dismiss, Dkt. 11, be GRANTED.

01 II. BACKGROUND AND PROCEDURAL HISTORY

02 Petitioner is a native and citizen of Guatemala who entered the United States without
03 inspection at El Paso, Texas, in March 1978. (Dkt. 12 at L60-61). Petitioner subsequently
04 adjusted his status to that of lawful permanent resident on August 22, 1991. (Dkt. 12 at R115).

05 On August 29, 2006, petitioner was convicted in the Superior Court of Washington For
06 King County of Violation of the Uniform Controlled Substances Act (“VUSCA”), Possession of
07 Cocaine, and was sentenced to six months incarceration. (Dkt. 12 at L19-22). On March 20,
08 2007, petitioner was convicted again in King County Superior Court of VUSCA, Possession of
09 Cocaine, and was sentenced to one year incarceration and one year probation. (Dkt. 12 at L26-
10 29).

11 ICE encountered petitioner on April 10, 2006, at the Washington Corrections Center in
12 Shelton, Washington, where he was serving his criminal sentence. (Dkt. 12 at L31). ICE issued
13 an immigration detainer for petitioner, and, on August 17, 2007, petitioner was transferred to ICE
14 custody upon his release from state custody. (Dkt. 12 at R17, R115). ICE issued a Notice to
15 Appear (“NTA”), charging petitioner with removability under Section 237(a)(2)(A)(iii) of the
16 Immigration and Nationality Act (“INA”), which provides for removal of an alien convicted of an
17 aggravated felony as defined by INA § 101(a)(43)(A). (Dkt. 12 at L13-15). On August 20, 2007,
18 ICE made an initial custody determination and granted petitioner release on \$25,000 bond. (Dkt.
19 12 at L5). Petitioner did not post bond and remained detained throughout his removal
20 proceedings.

21 On September 12, 2007, ICE filed Additional Charges of Inadmissability/Deportability,
22 withdrawing the original charge of removability issued on August 20, 2007, and charging

01 petitioner with removability under INA § 237(a)(2)(B)(i), which provides for removal of an alien
02 convicted of a violation of any law relating to a controlled substance. (Dkt. 12 at R175-76).

03 On October 4, 2007, an Immigration Judge (“IJ”) denied petitioner’s application for
04 asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”), and
05 ordered him removed to Guatemala. (Dkt. 12 at L166-70, R189). Petitioner appealed the IJ’s
06 decision to the Board of Immigration Appeals (“BIA”), which dismissed the appeal on January 9,
07 2008. (Dkt. 12 at L190-91). Petitioner filed a Petition for Review of the BIA’s decision and a
08 request for stay of removal. (Dkt. 12 at L193-96). Pursuant to Ninth Circuit General Order
09 6.4(c)(1)(3), this caused a temporary stay of removal to automatically issue. *See Solis v. Mukasey*,
10 No. 08-70381 (9th Cir. filed Jan. 28, 2008). Petitioner’s petition for review remains pending in
11 the Ninth Circuit.

12 On April 9, 2008, ICE completed a Post Order Custody Review of petitioner’s case and
13 determined that petitioner should remain detained, stating, in part, as follows:

14 A review of you’re a-file reveals no information that would support your release from
15 custody. You were provided advance notice of a pending file review. However, you
16 submitted no documents that would suggest you should be released from custody.
17 Rather, your extensive criminal record indicates a complete lack of regard for U.S.
18 laws and public safety. No information within your file indicated any attempts at
19 rehabilitation or acceptance of responsibility for your crimes. For these reasons you
20 would pose a significant threat to the public should you be release from custody.
21 Additionally, you have attempted to avoid removal from the U.S. You do not appear
22 to be eligible for relief from removal due to your criminal convictions as stated in the
BIA order. Should you be released from custody ICE has reason to believe that you
would abscond and not show up for removal from the U.S. For these reasons you are
considered a significant flight risk.

(Dkt. 12 at L199-200, R202-11).

On July 25, 2008, the Ninth Circuit issued decisions in *Casas-Castrillon v. D.H.S.*, 535

01 F.3d 942 (9th Cir. 2008) and *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), addressing
02 the lawfulness of detention of non-citizens who have appealed their cases to the court of appeals
03 and obtained a stay of removal. On September 30, 2008, petitioner filed the instant habeas
04 petition, arguing that he is entitled to a bond hearing before a neutral adjudicator pursuant to those
05 cases. (Dkt. 6). On October 17, 2008, however, petitioner was provided with a bond hearing
06 before an IJ, who set bond in the amount of \$30,000. (Dkt. 12 at L214). Petitioner did not appeal
07 the IJ's bond determination, and remains detained.

08 On November 19, 2008, respondent filed a Return Memorandum and Motion to Dismiss
09 arguing that petitioner has been provided the relief he was seeking and that his habeas petition
10 should be dismissed as moot. (Dkt. 11). On December 22, 2008, petitioner filed an untimely
11 response to the government's motion to dismiss, arguing that he cannot afford the \$30,000 bond
12 amount imposed by the IJ, and that the burden of proof at the hearing was placed on the wrong
13 party. (Dkt. 13). The Court ordered respondent to submit additional briefing addressing the
14 issues raised in petitioner's response. (Dkt. 14). Respondent filed a reply on January 23, 2009.
15 (Dkt. 15). The habeas petition and motion to dismiss are ripe for review.

16 III. DISCUSSION

17 Section 236 of the INA provides the framework for the arrest, detention, and release of
18 aliens in removal proceedings. That provision provides the Attorney General with discretionary
19 authority to release an alien on bond or conditional parole pending the completion of removal
20 proceedings, unless the alien falls within one of the categories of criminal aliens described in
21 Section 236(c), for whom detention is mandatory. *See* INA § 236, 8 U.S.C. § 1226. Once
22 removal proceedings have been completed, the detention and release of aliens shifts to INA § 241,

01 8 U.S.C. § 1231. The determination of when an alien becomes subject to detention under Section
02 241 rather than Section 236 is governed by Section 241(a)(1). Section 241(a)(1)(B) provides:

03 The removal period begins on the latest of the following:

04 (i) The date the order of removal becomes administratively final.

05 (ii) If the removal order is judicially reviewed and if a court orders a stay of the
06 removal of the alien, the date of the court's final order.

07 (iii) If the alien is detained or confined (except under an immigration process), the
08 date the alien is released from detention or confinement.

08 8 U.S.C. § 1231(a)(1)(B) (emphasis added). Pursuant to Section 241(a)(1)(B)(ii), where a court
09 issues a stay of removal pending its review of an administrative removal order, the alien continues
10 to be detained under Section 236 until the court renders its decision. *See Prieto-Romero*, 534
11 F.3d at 1059.

12 In the present case, the Ninth Circuit has issued a stay pending its review of petitioner's
13 administrative removal order. Accordingly, petitioner is detained pursuant INA § 236(a) *Prieto-*
14 *Romero*, 534 F.3d at 1062 ("Because Prieto-Romero filed a petition for review and our court
15 entered a stay, his detention is governed by § 1226(a); only if we enter a final order denying his
16 petition for review will the statutory source of the Attorney General's detention authority shift
17 from § 1226(a) to § 1231(a).").

18 The Ninth Circuit has determined that even though an alien's continued detention is
19 authorized by INA § 236(a), "due process requires 'adequate procedural protections' to ensure
20 that the government's asserted justification for physical confinement 'outweighs the individual's
21 constitutionally protected interest in avoiding physical restraint.'" *Prieto-Romero*, 534 F.3d at
22 1065 (quoting *Zadvydas*, 533 U.S. at 690-91). The Ninth Circuit held that an alien has the right

01 to contest the necessity of his detention before a neutral decision maker and an opportunity to
02 appeal that determination to the BIA. *See Prieto-Romero*, 534 F.3d at 1066.

03 In this instance, the administrative record shows that petitioner received a bond
04 redetermination hearing on October 17, 2008, before an IJ who granted him release on bond in
05 the amount of \$30,000. (Dkt. 12 at L214). Thus, petitioner “had an opportunity to contest the
06 necessity of his detention before a neutral decision-maker and an opportunity to appeal that
07 determination to the BIA.” *See Prieto-Romero*, 534 F.3d at 1065-66. Petitioner argues, however,
08 that the IJ should have placed the burden on the government to prove that he was not a flight risk
09 or a danger to the community. (Dkt. 13 at 1 and 9). The Court need not resolve this issue
10 because petitioner cannot show prejudice. *See Prieto-Romero*, 534 F.3d at 1066 (citing *Getachew*
11 *v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (holding that due process violations in immigration
12 proceedings are susceptible to harmless error analysis)).

13 The relevant determination in a bond hearing is whether the petitioner presents a danger
14 to the community or a flight risk. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). In
15 *Prieto-Romero*, the Ninth Circuit found that in setting bond at \$15,000, “the IJ necessarily found
16 – even with the burden of proof on the alien – that Prieto-Romero did *not* present a flight risk or
17 a danger to the community, and thus merited release from custody.” *Id.* at 1067. The Ninth
18 Circuit determined that Prieto-Romero was not entitled to habeas relief, because he could not
19 show that “the alleged due process violation adversely affected the IJ’s determination that he was
20 eligible for bond.” *Id.* at 1067. Here, as in *Prieto-Romero*, the IJ determined that petitioner
21 merited release on bond in the amount of \$30,000. Accordingly, petitioner cannot show that the
22 alleged due process violation – the burden of establishing eligibility for release – affected the IJ’s

01 determination that he was eligible for bond.

02 Petitioner also argues that the IJ set an excessively high bond amount. (Dkt. 13).
03 Respondent argues that the Court lacks jurisdiction to reach the merits of this claim. (Dkt. 15).
04 The Court agrees with respondent.

05 Section 236(e) of the INA does not permit the Court to review the IJ's discretionary
06 decision regarding the reasonableness of the bond amount, even if petitioner cannot afford to post
07 it. *Prieto-Romero*, 534 F.3d at 1067. That provision provides: "The Attorney General's
08 discretionary judgment regarding the application of this section shall not be subject to review. No
09 court may set aside any action or decision by the Attorney General under this section regarding
10 the detention or release of any alien or the grant, revocation, or denial of bond or parole." INA
11 § 236(e), 8 U.S.C. § 1226(e). Petitioner asks this Court to "second-guess the IJ's discretionary
12 assessment of the bond amount required to secure his presence at removal in the event that his
13 petition for review is denied." *Id.* The Court has no authority to reach the merits of this claim.

14 IV. CONCLUSION

15 For the foregoing reasons, I recommend that petitioner's habeas petition, Dkt. 9, be
16 DENIED, that respondent's motion to dismiss, Dkt. 11, be GRANTED, and that this matter be
17 dismissed with prejudice. A proposed Order accompanies this Report and Recommendation.

18 DATED this 4th day of February, 2009.

19 
20 Mary Alice Theiler
21 United States Magistrate Judge
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